

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Applications for Consent to the)
Transfer of Control of Licenses and)
Section 214 Authorizations from)
)
TELE-COMMUNICATIONS, INC.,)
Transferor)
to)
AT&T CORPORATION,)
Transferee)

CS Docket No. 98-178

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**MOTION OF U S WEST TO EXPEDITE RULING ON MOTION TO REQUIRE
APPLICANTS TO PROVIDE INTERESTED PARTIES WITH ACCESS TO HART-
SCOTT-RODINO DOCUMENTS**

U S WEST, Inc. ("U S WEST") respectfully requests that the Commission expedite its ruling on the pending Motion of SBC Communications Inc. To Require Review of Hart-Scott-Rodino and Other Documents, filed on October 14, 1998. That motion asked the Commission to require the applicants to provide to the Commission the documents already provided to the Department of Justice in connection with its Hart-Scott-Rodino ("HSR") review, *and* to make those documents available to the parties for review and comment subject to appropriate protective arrangements. Events since SBC filed its motion highlight the importance of enabling interested parties to review the documents in order to inform their comments and the Commission's action on the applications.^{1/}

^{1/} U S WEST expressed its support for SBC's motion in its petition to deny the applications. *See Applications for Consent to the Transfer of Control of Licenses and Section* (continued...)

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SBC's motion demonstrated that, in each of the recent major telecommunications mergers (Bell Atlantic/NYNEX, MCI/WorldCom, and SBC/Ameritech), the Commission required the applicants to provide interested parties with access to the HSR documents filed by the applicants with the Department of Justice.^{2/} Indeed, AT&T was a leading proponent of such disclosure in the Bell Atlantic/NYNEX and SBC/Ameritech mergers:

The Commission should obtain, and make available to all parties under a confidentiality order, all documents that Bell Atlantic and NYNEX produced to the Justice Department that are relevant to the competitive effects of the proposed merger. The Commission should then give other parties an opportunity to file additional comments following their review of these documents^{3/}

There is no rational basis for failing to do the same with respect to the AT&T/TCI merger, as to which the Commission has precisely the same obligation to assess the competitive consequences under the public interest standard of section 310(d) of the Communications Act. *See* 47 U.S.C. §

^{1/} (...continued)

214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corporation, Transferee, CC Docket No. 98-178, Petition of U S WEST To Deny Applications or To Condition Any Grant, at 51-52 (filed Oct. 29, 1998).

^{2/} In *Bell Atlantic/NYNEX*, these included at least 30,000 pages of documents concerning (1) the applicants' strategic planning related to the proposed transfers; (2) perceived and actual potential competition; (3) in-region interexchange service; and (4) the state of competition in the local exchange markets in the applicants' service areas. *See NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20000 ¶ 28 (1997).

^{3/} *Proposed Merger of Bell Atlantic Corp. and NYNEX Corp.*, Report No. 960205, Petition of AT&T Corp. To Deny or, in the Alternative, To Defer Pending Further Investigation and Briefing, at 29 (filed Sept. 23, 1996); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141, Order Adopting Protective Order, DA 98-1952, ¶ 4 (rel. Oct. 2, 1998) (noting that AT&T was one of two parties to file comments supporting the proposed protective order).

310(d). Any decision to accord different treatment to AT&T as a merger applicant would plainly constitute reversible error.^{4/}

The Commission recently reiterated that it cannot act on a proposed transfer of control without first allowing for review of such documents by interested parties. It has stressed that a petitioner to deny in a Title III license proceeding “must be afforded access to *all information* submitted by licensees that bear upon their applications,”^{5/} as well as “an opportunity to file or supplement its petition to deny the license after it has had an opportunity to review the protected material.”^{6/}

In this instance, AT&T has now made the documents available to the Commission for review. This fact compels the Commission to provide the parties the same opportunity to review the documents and express their views on the documents’ significance, and would render utterly untenable any decision by the Commission to deny the parties that opportunity. AT&T’s *ex parte* filing of October 27, 1998 discloses that the Commission has “requested [the applicants’] authorization to review all documents provided by the Applicants to the Department

^{4/} See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (finding that Commission’s decision to treat applicants differently without explanation was error); see also *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1995).

^{5/} *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Report and Order, FCC 98-184, ¶ 33 (rel. Aug. 4, 1998) (emphasis added) (“*Confidential Information Order*”).

^{6/} *Id.* ¶ 34; see also *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (requiring the Commission in license renewal case to (1) place on the record the full report of the Commission’s investigation and all evidence it receives, and (2) provide petitioners with a reasonable time for response and rebuttal).

of Justice in connection with the Department's investigation of the proposed merger," and to discuss the documents with the Department.^{7/} The applicants have agreed to that request.^{8/}

AT&T's filing indicates that the Commission intends to allow the parties to see the documents only *after* it has made up its mind — without the benefit of comments by the parties — about the documents' significance, and only *if* the Commission chooses expressly to rely on particular documents in its decision.^{9/} Such a selective "decide first, disclose later" procedure is a total departure from the Commission's practice with respect to other recent mergers and ignores the obvious purpose of allowing the parties to review the documents: to aid the Commission in assessing their significance by commenting on how the documents relate to the issues posed by the merger. If the Commission adheres to the unprecedented and unfair procedure that it appears to contemplate, it will fatally infect any decision the Commission may make on the applications.

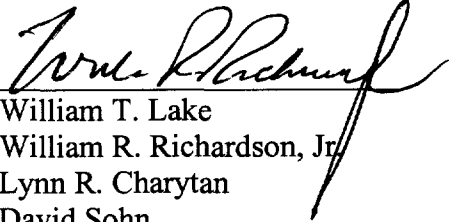
^{7/} *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corporation, Transferee*, CC Docket No. 98-178, *Ex parte* filing by AT&T (filed Oct. 27, 1998).

^{8/} *Id.*

^{9/} AT&T's October 16 notice of its oral *ex parte* presentation regarding HSR documents does not contain the required "summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed." 47 C.F.R. § 1.1206(b)(2). However, AT&T's October 27 filing suggests that the Commission has indicated that it will make the HSR documents available to third parties only "if and when the Commission determines that it may wish to rely on or reference [the documents] in its decision in this proceeding." As discussed above, such a practice of restricting access to materials that the Commission itself reviewed in connection with its decision would be plainly inconsistent with the Commission's handling of other recent mergers, its general policy for Title III license proceedings established in the *Confidential Information Order*, and the fundamental requirements of administrative due process established in *Bilingual*.

The Commission therefore should expedite its ruling on SBC's motion and grant interested parties access to the applicants' HSR documents in the same manner as in other recent merger proceedings.

Respectfully submitted,



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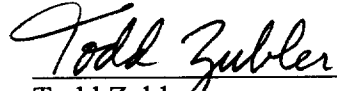
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December 7, 1998

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CERTIFICATE OF SERVICE

I, Todd Zubler, certify that on this 7th day of December 1998, a copy of the foregoing Motion of U S WEST To Expedite Ruling on Motion To Require Applicants To Provide Interested Parties with Access to Hart-Scott-Rodino Documents was served either by hand or by first class U.S. mail, postage prepaid, on the parties listed on the attached Service List.



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